1992

Creighton C. Horton II v. Utah State Retirement Board : Reply Brief

Utah Court of Appeals

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Creighton C. Horton II; Petitioner, Pro Se.

DOCKET NO. 92-0273-CA

IN THE UTAH COURT OF APPEALS

CREIGHTON C. HORTON II,	:	
Petitioner,	:	No. 920273-CA
-vs-	:	
UTAH STATE RETIREMENT BOARD,	:	Priority No. 15
Respondent.	:	

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

POINT I RESPONDENT'S ASSERTION THAT LEGISLATIVE HISTORY SUPPORTS ITS POSITION IS INCORRECT. 1

POINT II RESPONDENT'S ARGUMENTS THAT PETITIONER'S RIGHTS HAVE NOT VESTED OR, ALTERNATIVELY, THAT HE HAS RECEIVED A "SUBSTANTIAL SUBSTITUTE" FOR THE BENEFITS TAKEN FROM HIM BY THE BOARD'S ACTION, ARE WITHOUT MERIT. 3

POINT III RESPONDENT'S ASSERTION THAT RESOLUTION #86-15 IS CONSISTENT WITH ITS POSITION IS ERRONEOUS 4

CONCLUSION. 6

TABLE OF AUTHORITIES

Utah Code Ann., § 49-2-301 (1992) 3

Utah Code Ann., § 49-3-203 (1992) 1

OTHER AUTHORITIES

Utah Retirement Board Resolution #86-15 5

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POINT I

RESPONDENT'S ASSERTION THAT LEGISLATIVE HISTORY SUPPORTS ITS POSITION IS INCORRECT

Respondent in its memorandum focuses only on selected portions of the relevant retirement statutes in an attempt to bolster its argument that Utah Code Ann. § 49-3-203 (1992) is unambiguous and mandates that petitioner be forced into the noncontributory retirement system because he transferred from the Salt Lake County Attorney's Office to the Attorney General's Office. Respondent's assertion that the other retirement statutes cited by petitioner are not relevant to whether petitioner is entitled to remain a member of the contributory retirement system is an effort to

dissuade the court from examining the entire statutory scheme and to focus attention upon merely an isolated portion of it. Respondent's brief cites no supporting authority, whereas petitioner's brief cites authority for the proposition that in ascertaining legislative intent, courts should consider all statutory provisions, seek a construction which harmonizes all portions, and avoid a construction that rests on an assumption that the legislature intended to do unfair, unjust, or unreasonable things.

Respondent in its memorandum incorrectly states that petitioner attempted to effectuate a legislative amendment. In fact, petitioner merely inquired of Senator Kay Cornaby, the sponsor of the original legislation establishing the noncontributory system, whether the legislature intended to force those in petitioner's situation into the new system, as had been represented to petitioner by the Board. In response to petitioner's inquiry and not upon his solicitation, Senator Cornaby sponsored legislation which would have clarified that employees in petitioner's position could elect to remain in the contributory system. Respondent and petitioner agreed to suspend petitioner's case until after the legislative session, in case the bill's passage resolved the issues in his case.

Respondent incorrectly characterizes the failure of the bill's passage as evidence of legislative intent in its favor. It is not. As the Stipulation of Facts provides, and respondent acknowledges, the bill passed in the Senate but was not called up or even

considered by the House. Since the bill was not considered, it was never acted upon, nor was any vote taken. Respondent's brief inconsistently acknowledges that the bill was not considered in the House and then argues that such a failure somehow demonstrates legislative intent. The bill's failure to reach consideration in the House is no greater indication of legislative intent than is the fact that it passed without opposition in the Senate.

POINT II

RESPONDENT'S ARGUMENTS THAT PETITIONER'S RIGHTS HAVE NOT VESTED OR, ALTERNATIVELY, THAT HE HAS RECEIVED A "SUBSTANTIAL SUBSTITUTE" FOR THE BENEFITS TAKEN FROM HIM BY THE BOARD'S ACTION, ARE WITHOUT MERIT

Respondent's argument that petitioner's retirement benefits have not vested because he has not satisfied all conditions precedent to retirement begs the question. Certainly if petitioner is forced into the noncontributory system his benefits will not vest until retirement. The primary difference between the retirement systems is that, in the contributory system, amounts contributed by the employer vest immediately to the employee's benefit, while in the noncontributory, vesting does not occur until retirement. This is statutory and not a question of Board interpretation. Utah Code Ann. § 49-2-301 (1992). Implicit in respondent's argument is the notion that at any time up to the point of retirement it may change the rules of the game. This is inconsistent with Utah's approach that pension benefits are not mere gratuities, but are contractual in nature, and that no substitute may adversely affect the employee's vested rights.

The argument that the noncontributory system provides a substantial substitute for the loss of the 6% vested contribution made by the employer under the contributory system is disingenuous. The Legislature did not take the "substantial substitute" approach when it originally enacted the legislation establishing the noncontributory retirement system. If it had, it could have simply provided that all members of the contributory system would henceforth be forced into the noncontributory system. Instead, it took into account employees' vested rights, and specifically provided that <u>any</u> current member of the retirement system, whether a state employee or an employee of a political subdivision, had the absolute right to not be forced into the new noncontributory system, a system in which the employee's right to continually vesting contributions would be cut off. It is disingenuous to suggest that a 1.5% employer contribution to a 401(k) program (as opposed to 6% actively vesting under the contributory system) and a three-year rather than five-year final salary averaging for a benefit determination <u>if</u> one retires in the system, is a substantial substitute for the benefits one receives under the contributory system.

POINT III

RESPONDENT'S ASSERTION THAT RESOLUTION #86-15 IS CONSISTENT WITH ITS POSITION IS ERRONEOUS

Respondent strains to differentiate petitioner's situation from those employees who left the employ of political subdivisions and "enter[ed] full-time employment with the state" after the effective date of the act, but who were treated as transferees by

Board Resolution #86-15. Respondent in its memo states that "...the only reason that Respondent allowed employees who changed employment during the election period to consider the change in employment as a 'transfer' was to preserve the election period of those employees, which was statutorily guaranteed for a period of six months after the effective date of the act..." (Respondent's brief, pp. 10-11).

This analysis is inconsistent because, under respondent's interpretation, no employee entering employment with the state after the effective date had any statutorily guaranteed right to elect between systems. Indeed, respondent justifies its action in petitioner's case on the ground that unambiguous statutory language mandates that any employee who voluntarily elects to move from one unit of government to another loses all protection against being forced into the noncontributory system. The entire thrust of respondent's argument is that the statute is clear and unambiguous, and mandates such action. Yet respondent cannot get around the fact that it accomplished by resolution that which it now claims is strictly prohibited under the statute, namely, allowing one who transfers employment from a political subdivision to the state after the effective date of the legislation to be treated as a transferee rather than as a new employee.

The statute itself is silent on rights of transferees, creating the ambiguity which gave rise to Board Resolution #86-15. This statutory ambiguity is one respondent now refuses to acknowledge, although it concedes that the Retirement Act must be

interpreted liberally in petitioner's favor. Respondent's unwillingness to concede the ambiguity which is evidenced by its own resolution is contradictory but not surprising, since its entire argument hinges on the premise that the statute clearly cuts off the rights of transferees, an argument which its own resolution belies.

CONCLUSION

Based upon the foregoing and the argument and authority contained in the brief of petitioner previously filed, the decision of the Board denying petitioner's request should be reversed and petitioner should be allowed to remain a member of the contributory retirement system under the provisions of Section 2 of Title 49, U.C.A., 1953 as amended, known as the "Public Employees' Retirement Act."

DATED this 2nd day of September, 1992.

C. K. Horton II
Petitioner

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the foregoing REPLY BRIEF OF PETITIONER to the following this 2nd day of September, 1992:

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